

IN THE MATTER OF:	)	AGREEMENT FOR RECOVERY
	)	OF PAST RESPONSE COSTS
Cal-Tech Metal Finishers Inc.	)	
841 31 <sup>st</sup> Street	)	
Oakland, California	)	U.S. EPA Region IX
	)	CERCLA Docket No. R9-2004-0008
Donald G. Dean	)	
SETTLING PARTY	)	PROCEEDING UNDER SECTION
	)	122(h)(1) OF CERCLA
	)	42 U.S.C. § 9622(h)(1)

## **I. JURISDICTION**

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to the Branch Chief of the Response, Planning and Assessment Branch by Regional Delegation R9-1290.20.

2. This Agreement is made and entered into by EPA and Donald G. Dean (the "Settling Party"). The Settling Party consents to and will not contest EPA's authority to enter into this Agreement or to implement or enforce its terms.

## **II. BACKGROUND**

3. This Agreement concerns the Cal-Tech Metal Finishers Inc. ("Cal-Tech") facility located at 841 31<sup>st</sup> Street, Oakland, California (the "Site"). EPA alleges that the Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. a. The Site operated as an electroplating facility for at least thirty (30) years and ceased operations on or before April 9, 2001. During the period of time that Cal-Tech was operational, the Settling Party was retained by Cal-Tech to direct and supervise the operations at the facility.

b. On April 9, 2001, the City of Oakland Fire Department conducted an inspection at the Site, with EPA providing technical assistance at the fire department's request. As a result of the inspection, the City Fire Marshall issued a "Stop Order" requiring Cal-Tech to prepare a work

plan for the removal of all hazardous materials at the Site. Upon learning Cal-Tech had abandoned the Site, the City of Oakland again requested EPA's assistance, this time with assessing and disposing of hazardous substances from the Site.

c. EPA conducted a removal evaluation at the Site on April 26, 2001, and observed conditions indicating improper and dangerous storage and handling of hazardous materials, which included the mislabeling of chemical containers for reuse; storing highly incompatible chemicals in close proximity to each other, creating a risk of volatile reactions and hazardous releases; plating vats without secondary containment to prevent offsite overflow; and potential vat failure due to deteriorating containers, vandalism, fire, earthquake or explosion that would have resulted in the many hazardous substances mixing and subjecting the surrounding population to hazardous chemical exposure. The chemicals identified at the Site included nitric acid, hydrochloric acid, chromic acid, chromium, sodium hydroxide and cyanide, all of which are "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), 40 C.F.R. § 302.4 and Table 302.4.

d. Threats to public health and/or the environment stemmed from the potential for deteriorating conditions at the abandoned Site, creating an imminent and substantial threat of a catastrophic release of hazardous substances caused by vandalism, fire, earthquake or explosion in a densely populated community.

e. The Settling Party maintained substantial control over the method and implementation of Cal-Tech's operations, including the use, storage and disposal of process chemicals. These operations produced the conditions at the Site and the threats to public health and the environment.

f. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604.

5. In performing the response actions, EPA has incurred response costs at or in connection with the Site.

6. EPA alleges that the Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred or to be incurred at or in connection with the Site.

7. EPA has determined that the total past and projected response costs of the United States at or in connection with the Site are approximately \$967,836, excluding current interest.

8. EPA and the Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law.

### **III. PARTIES BOUND**

9. This Agreement shall be binding upon EPA and upon the Settling Party and his heirs, successors and assigns. Any change in ownership or corporate or other legal status of the Settling Party, including but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the respective parties represented.

### **IV. DEFINITIONS**

10. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

- a. "Agreement" shall mean this Agreement.
- b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*
- c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.
- d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.
- e. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.
- f. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.
- g. "Parties" shall mean EPA and Donald G. Dean.
- h. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA has paid at or in connection with the Site, plus accrued Interest on all such costs.

i. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

j. "Settling Party" shall mean Donald G. Dean.

k. "Site" shall mean the Cal-Tech Metal Finishers Inc. facility located at 841 31<sup>st</sup> Street, Oakland, California.

l. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

#### **V. PAYMENT OF RESPONSE COSTS**

11. The Settling Party has paid \$15,000 to EPA for past response costs at the Site in exchange for the covenants and protections herein.

12. The total amount paid as stated in Paragraph 11 shall be deposited in the EPA Hazardous Substance Superfund.

#### **VI. FAILURE TO COMPLY WITH AGREEMENT**

13. Stipulated Penalty.

a. If the Settling Party fails to satisfy the terms and obligations of this Agreement, then the Settling Party shall be in violation of this Agreement and shall pay to EPA as a stipulated penalty \$100.00 per violation per day.

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties," and shall include a statement referencing the Site name (Cal-Tech Metal Finishers), the EPA Region 9 Site/Spill ID Number (09 HF) and the EPA Docket Number of this Agreement (R9-2004-0008). The Settling Party shall send a cashier's check for payment to :

EPA - Cincinnati Accounting Operations  
Attention: Region 9 Receivables  
P.O. Box 371099M  
Pittsburgh, PA 15251

c. At the time of each payment, the Settling Party shall also send notice that payment has been made to EPA in accordance with Section XII (Notices and Submissions). Such notice shall identify the Site name, the EPA Region 9 Site/Spill ID Number and the EPA Docket Number for this action.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified the Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

14. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to EPA by virtue of the Settling Party's failure to comply with the requirements of this Agreement, if the Settling Party fails or refuses to comply with the requirements of this Agreement, then the Settling Party shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States, on behalf of EPA, brings an action to enforce this Agreement, the Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

15. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties or Interest that has accrued pursuant to this Agreement. Payment of stipulated penalties shall not excuse the Settling Party from payment as required by Section V or from performance of any other requirements of this Agreement.

16. Interest on Late Payments. If the Settling Party fails to make any payment required by this Section by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

## **VII. COVENANT NOT TO SUE BY EPA**

17. Except as specifically provided in Section VIII (Reservations of Rights by EPA), EPA covenants not to sue or take administrative action against the Settling Party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon receipt by EPA of all amounts required by Section V (Payment of Response Costs) and any amounts due under Section VI (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by the Settling Party of his obligations under this Agreement. This covenant not to sue is also conditioned upon the veracity and completeness of the financial information provided to EPA by Settling Party. If the financial information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Party shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other causes of action arising from Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Party and does not extend to any other person.

### **VIII. RESERVATIONS OF RIGHTS BY EPA**

18. EPA reserves, and this Agreement is without prejudice to, all rights against the Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 17. Notwithstanding any other provision of this Agreement, EPA reserves all rights against the Settling Party with respect to:

- a. liability for failure of the Settling Party to meet a requirement of this Agreement;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

19. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a signatory to this Agreement.

### **IX. COVENANT NOT TO SUE BY SETTLING PARTY**

20. The Settling Party covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs or this Agreement, including but not limited to:

- a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
- b. any claims arising out of the response actions at the Site for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of California, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

21. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

22. The Settling Party agrees not to assert any claims and to waive all claims or causes of action that he may have for all matters relating to the Site, including for contribution, against any person where the person's liability to the Settling Party with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

23. The waiver in Paragraph 22 shall not apply with respect to any defense, claim, or cause of action that the Settling Party may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against the Settling Party. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6972, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

#### **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

24. EPA and the Settling Party agree that the actions undertaken by the Settling Party in accordance with this Agreement do not constitute an admission of any liability by the Settling Party. The Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in Section II of this Agreement.

25. The Parties agree that the Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are Past Response Costs.

26. The Settling Party agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Agreement, he will notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. The Settling Party also agrees that, with respect to any suit or claim for contribution brought against him for matters related to this Agreement, he will notify EPA in writing within 10 days of service of the complaint or claim upon him. In addition, the Settling Party shall notify EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Agreement.

27. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, the Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue by EPA set forth in Section VII.

#### **XI. RETENTION OF RECORDS**

28. Until 5 years after the effective date of this Agreement, the Settling Party shall preserve and retain all records, reports or information (hereinafter referred to as "records") now in his possession or control, or which come into his possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person under CERCLA with respect to the Site, regardless of any corporate or individual retention policy to the contrary.

29. After the conclusion of the 5-year document retention period in the preceding paragraph, the Settling Party shall notify EPA at least 90 days prior to the destruction of any such records and, upon request by EPA, the Settling Party shall deliver any such records to EPA. The Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Party asserts such a privilege, he shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged information only. The Settling Party shall retain all records that he claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

30. The Settling Party hereby certifies that, to the best of his knowledge and belief, after



thorough inquiry, he has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to his potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against him regarding the Site and that he has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XII. NOTICES AND SUBMISSIONS**

31. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and the Settling Party.

### **As to EPA:**

United States Environmental Protection Agency  
Andrew Helmlinger, Office of Regional Counsel  
75 Hawthorne Street (ORC-3)  
San Francisco, California 94105

### **As to the Settling Party:**

Donald G. Dean  
517 St. George Road  
Danville, California 94526

## **XIII. INTEGRATION**

32. This Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement.

## **XIV. PUBLIC COMMENT**

33. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

**XV. ATTORNEY GENERAL APPROVAL**

34. The United States Attorney General or his designee has approved the settlement embodied in this Agreement in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

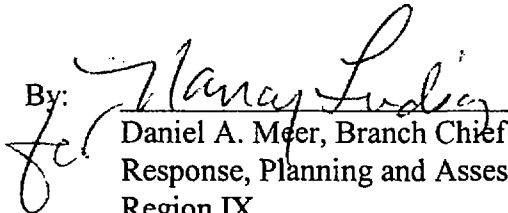
**XVI. EFFECTIVE DATE**

35. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 33 has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Agreement.

IT IS SO AGREED:

U.S. Environmental Protection Agency

By:

  
Daniel A. Meer, Branch Chief  
Response, Planning and Assessment  
Region IX

10/12/04  
[Date]

THE UNDERSIGNED SETTLING PARTY enters into this Agreement in the matter of the Cal-Tech Metal Finishers Inc. Site, EPA Docket No. R9-2003-0008, located at 841 31<sup>st</sup> Street, Oakland, California.

FOR SETTLING PARTY:



Donald G. Dean  
517 St. George Road  
Danville, California 94526

9-21-04

Date